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PETITIONERS' REPLY BRIEF TO RESPONDENT'S OPPOSITION

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1027

ROBERT WAVERLY HICKS, ET AL.,
Petitioners

v.

PHYSICAL THERAPISTS EXAMINING BOARD FOR THE DISTRICT OF COLUMBIA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF OF PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

PREFATORY STATEMENT

By way of prefatory statement, the petitioners will briefly reply to the allegations in the respondent's counter-statement of the case.

The respondent alleges that petitioners testified in a "conclusory fashion" concerning their background and experience. By way of reference to the "Joint Appendix," the respondent attempts to minimize the prima facie case presented by petitioners by citing isolated instances rather than basing its case upon the entire record. Respondent further alleges that most of petitioners' testimony was "unrelated to physical therapy." This overlooks the fact that this training and experience is comparable to the prerequisite background educational requirements for an approved school of physical therapy.[1]

Respondent fails to accurately state the true facts displayed by the record concerning the petitioners' practice and number of patients treated.[2] Much of their testimony and evidence in this respect was arbitrarily excluded as not being in the two-year period.[3]

Respondent erroneously relies on the fact that petitioners were not employed at a hospital or nursing home. The record indicates that they made no claim to such employment.

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[1] In reference to footnote No. 2, p. 2, Respondent's Brief, records furnished to respondent by Petitioner Hicks, and still in its possession, show that he had been admitted to the George Washington University as a pre-medical student. (See Appendices I dated September 27, 1933 and II, dated 19th February, 1965, *infra*.) Further evidence of Petitioner Hicks' matriculation as a pre-medical student appears in the record concerning his thesis "Human Biochemistry and Physiology" turned in to Dr. Frank A. Hornaday upon completion in May, 1936, (JA 130-132). Appendix III explains the absence of evidence from Dr. Hornaday as a result of his untimely death.

[2] Petitioners Hicks, Schramm and Hlebanja testified at length to "ailments treated" and "techniques used" (Petition for a Writ of Certiorari, pp. 18-20). See testimony of James R. Morton, JA 164-169. And see Exhibit W, Affidavit of Etta Brodie, JA 58-62; Duryee affidavit, Exhibit V (JA 32-57, 106-109, 176-179 [R. 180-186]). Reserve Officer, U.S. Army, medical training, JA 106-107.

[3] Petition for a Writ of Certiorari, pp. 27-28.

They did testify and present evidence of hospital[4] and home calls as private practitioners of physical therapy upon medical doctors' orders.

Respondent misstates the record concerning members of the medical profession as references. Exhibit O (JA 27, 121) in the case of Robert W. Hicks and Exhibit B (JA 200, 209, 223) in the case of Leona E. Schramm, clearly show petitioners treated many patients referred by Robert W. Mance, M.D., for physical therapy treatments.

Respondent's conclusion that petitioners failed to prove that they had practiced physical therapy in the District of Columbia for two years immediately prior to the effective date of the Physical Therapists Practice Act was arbitrary and capricious and without foundation in the record. In addition to clear and unequivocal testimony by the petitioners, this was corroborated by the Board's "Work Sheets for Checking Applications" (JA 9, 196, 239). This is further substantiated by the respondent's inconsistent ruling that during this two-year period the applicants engaged in, at least, foot therapy, massage, steam baths, and colonic therapy, which by the medical profession's definitions are physical therapy (Petition for a Writ of Certiorari, pp. 17-18). Furthermore, the undisputed evidence showed that any and all treatments of patients by petitioners were under the supervision and prescription of medical doctors. This arbitrary conclusion is also disproved by the fact that all three petitioners, since 1960, were issued Professional Business Licenses designated as Physical Therapists by the Government of the District of Columbia.[5]

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[4]Sibley Memorial Hospital Nurses Notes, Exhibit X (JA 63-68, 123, 207-208, 253, 255-257, hospital and home calls, JA 120, 122, 152, 248-251, Clinical Laboratory: Johns Hopkins University Hospital, JA 111-112).

[5]Hicks JA 12); Schramm (JA 199), and Hlebanja (JA 242).

ARGUMENT

Petitioners Present Substantial Questions Warranting the Exercise of this Court's Jurisdiction To Review on Writ of Certiorari

Petitioners submit that there is ample grounds for review of this cause by Writ of Certiorari within the Rules of this Court. While the respondent contends the Physical Therapists Practice Act for the District of Columbia is a local issue, this argument overlooks the urgent need for the establishment of standards for administrative bodies. The matter of standards is an important question touching on the federal laws and of general application throughout the country.

In an attempt to maintain the position that this is a "local" issue, respondent cites six cases heretofore decided by this Court (Brief of Respondent, pp. 3-4). Five of these cases all dealt with a limited issue, the outcome of which would have no effect reaching beyond the boundaries of the District of Columbia. This is not the circumstance in the instant case. See *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965); *Miller v. United States*, 357 U.S. 301 (1958). The setting of adequate standards as guidelines to administrative agencies for the regulation of the public presents an issue of far reaching national importance. Review by this Court of cases national in scope is delineated in the case of *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935).

The United States Court of Appeals for the District of Columbia Circuit Committed Numerous Egregious Errors When It Failed To Reverse Petitioners' Cases

Respondent contends that there is no showing by petitioners of egregious error. Such errors have been set out at length in the Petition for a Writ of Certiorari. The highlights of these issues will merely be touched on here to dramatize the egregious errors of the United States Court of Appeals for the District of Columbia Circuit.

The first error by which the petitioners feel aggrieved is the sanctioning by the United States Court of Appeals for the District of Columbia Circuit, hereinafter referred to as the "U.S. Court", of the use of a prejudicial standard exceeding the authority of the Board as a basis to evaluate their cases and thereby denying them licensure. The authority granted by Congress was to license "without examination", those physical therapists meeting requirements of age and character who were (1) graduates of an approved school, or (2) those who demonstrated "comparable training or experience", Section 9(1) and 9(2) of the Physical Therapists Practice Act [D.C. Code Ann. § 2-458, Supp. V, 1966].

The respondent adopted Appendix B[6] as a guise to define comparable training or experience. This prejudicial standard was utilized by the Board, on a line by line basis, to examine the petitioners (Petition for a Writ of Certiorari, pp. 14-16). This so-called standard "Appendix B" required training and experience far exceeding the intent and purpose of Congress without regard to due process of law. *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).

The U.S. Court also committed egregious error in sanctioning extensive oral examination by the Board. This conduct was proscribed in the case of *Sherman v. Physical Therapists Examining Bd.*, 208 A.2d 728 (D.C.Ct.App. 1965).[7] The Board insisted on this course of conduct over the objection of Counsel. This examination was wrongfully conducted notwithstanding the fact that the petitioners had been precluded from taking the written examination in lieu of seeking licensure on Waiver Application (Petition for a Writ of Certiorari, Appendices N-1 and O-1).

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[6]"APPENDIX B, CRITERIA FOR MEETING REQUIREMENT OF PUBLIC LAW 87-280, SECTION 9, (2) 'RECEIVED COMPARABLE [TRAINING OR] . . . EXPERIENCE IN THE PRACTICE OF PHYSICAL THERAPY . . .'". (JA 91-102)

[7]Petition for a Writ of Certiorari, pp. 25-27.

Further error committed by the U.S. Court was the tacit approval of the arbitrary and capricious conduct of the Board, and the total disregard of the law of evidence. The latter is particularly emphasized by the so-called rebuttal of the petitioners' prima facie case on the testimony of only one witness, Hope H. McIntyre, the Executive Secretary to the Board.[8] This testimony amounted only to a reiteration of her administrative duties.

Additional error by the U.S. Court, as outlined in the case of Petitioner Hicks,[9] was the failure to recognize prejudicial error. This was the glossing over of the finding of fact by the Board that the petitioners were not graduates of approved schools.[10] This error was ignored even though the petitioners were seeking a license under a "grandfather clause" based on "comparable training or experience," and not on the basis or in the category of having been graduated from approved schools. The arbitrary and capricious rejection of all applicants by the Board who were not graduated from approved schools was affirmed by the Board's only witness.

The U.S. Court further erred in permitting the Board to taint the record in the case of Petitioner Hlebanja. This was the distorting of the record by the Chairman of the Board, by altering the record, without legal justification, and then certifying it as "a true and accurate account of the hearing".[11]

The U.S. Court continued to compound its errors and committed further wrong by failing to evaluate "comparable training or experience". The evidence showed that petitioners had extensive training and experience extending over a lengthy period; Petitioner Hicks - 20 years, Petitioner Schramm - 15 years, and Petitioner Hlebanja - 10 years. By

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[8]Footnote 35, pp. 24-25 - Petition for a Writ of Certiorari.

[9]Petitioner Hicks - Opinion of District of Columbia Court of Appeals, JA 188.

[10]JA 89-90, 202, 245.

[11]Petition for a Writ of Certiorari p. 31, (JA 253 and [R. 19]).

the failure of the U.S. Court to properly evaluate the standard set forth in the Act, it permitted the very thing which Congress had attempted to avoid, namely, not to legislate such experienced practitioners out of business. This Court, as early as 1910, in the case of *Watson v. Maryland*, 218 U.S. 173 (1910), recognized this principle. There it was stated:

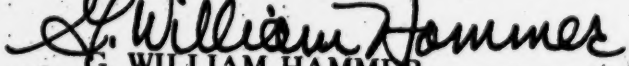
> Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts.

The totality of errors by U.S. Court was furthered by the injection into the case of a matter not in issue in the hearing before the Board, nor on appeal to the District of Columbia Court of Appeals. This was done by rationalizing the errors committed below by stating that nothing done by the Board nor the District of Columbia Court of Appeals was in contravention of the rights of the petitioners by virtue of Section 4 (e) of the Physical Therapists Practice Act [D.C. Code Ann. § 2-453 (e), Supp. V, 1966]. The U.S. Court then denied petitioners a rehearing *en banc* which asked that any rights they had under that Section 4 (e) be clarified. That Court further denied a motion on behalf of petitioners for further clarification of Section 4 (e) after denying the petition for rehearing. Had the U.S. Court not committed this error by speciously considering this issue, an opposite result could have been achieved in that Court. That this Section 4 (e) was not an issue in the case at the outset is manifested by the conduct of the Board in all out efforts which resulted in the closing of petitioners' private Physical Therapy Clinic and the threat of immediate criminal prosecution if they failed to comply.

CONCLUSION

The issues presented by this case are clearly beyond that of a local issue not extending beyond the boundaries of the District of Columbia. The case embodies the setting of standards that are national in scope as applied to administrative agencies and Federal Laws and represents a national issue of great magnitude. For the reasons presented, it also represents a denial of due process of law under the 5th and 14th Amendments to the Constitution of the United States. Because of this and the egregious errors committed by the United States Court of Appeals for the District of Columbia Circuit outlined above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Attorney for Petitioners

APPENDIX I

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, D. C.

OFFICE OF
THE DIRECTOR OF ADMISSIONS

September 27, 1933.

Mr. Robert W. Hicks,
1502 Vermont Avenue,
Washington, D.C.

My dear Mr. Hicks:

I am very glad to inform you that you are eligible for admission to the University. However, in view of your inability to get original certificates in the proper form from the Maury High School, in which school you have eight units, you are being admitted to the Junior College, General curriculum, instead of to the Junior College, Pre-Medical curriculum. You may take the courses prescribed for the Pre-Medical curriculum, however, and upon the completion of the first thirty semester hours of academic work with a C average, you may be transferred to the Pre-Medical course.

The Medical School has examined your credentials and is willing to recognize the following high school units for entrance. ***

Total. . . . . 15 Units

If you wish to enter the University this fall, it will be possible for you to register as late as October 3. However, it is to your advantage to get into your classes as soon as possible. I shall be glad to waive the five dollar late registration fee.

We shall be very glad to have you as one of our students.

Very sincerely yours,

H. G. Sutton
Director of Admissions

(s)wr

APPENDIX II

THE GEORGE WASHINGTON UNIVERSITY
SCHOOL OF MEDICINE
FROM THE OFFICE OF THE DEAN

THE GEORGE WASHINGTON UNIVERSITY
MEDICAL LIBRARY
1335 H STREET, N.W., WASHINGTON, D. C. 20005

19 February 1965

Physical Therapists Examining Board
Government of the District of Columbia
Department of Occupations and Professions
1145 19th Street, N.W.
Washington, D.C.

Dear Sir:

Mr. Robert W. Hicks, former undergraduate student, recently inquired at the Medical Library about a copy of a thesis he prepared entitled: "Human Biochemistry and Physiology", and in turn gave the requested copy in May 1936 to Dr. Frank A. Hornaday, his Academic Student Advisor, Executive Officer of the Department of Medicine.

Unfortunately at this late date, a search of the files (R111 .G35) of "Presented Prepared Papers" on research projects in the Medical Library does not include any papers prior to the year 1941 as now being available.

Sincerely yours,

Isabella Young
Medical Librarian

APPENDIX III

MEMORANDUM

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA

TO: WASHINGTON, D. C.

FROM: DATE: 1/5/65

SUBJECT:

Dr. Frank Adelbert Hornaday
Died Feb. 10th 1951

Dora Caylor